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ABSTRACT

"The American Indian and the Constitution" is a proposed course in law, sociology, or history. The document gives a course justification and intended audience. The course outline covers: 1) the sovereignty of Native American Tribes, especially as demonstrated in "Cherokee Nation" and "Worchester v. Georgia"; 2) criminal jurisdiction; 3) civil jurisdiction; 4) citizenship for Native Americans; 5) water rights as detailed in the Winters Doctrine; 6) hunting and fishing rights; 7) state taxing authority; 8) the U.S. Bill of Rights; and 9) the Indian Bill of Rights. Noted court cases and judges' opinions are given for all sections. (KM)

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A Proposed Course

in

Law,

Sociology,

or History

by Richard West, Jr.

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"The American Indian and the Constitution"

I. Justification for special course in curriculum.

A. The unique relationship between the American Indian and the Constitution.
B. The relative lack of literature on the subject.

II. Population for which the material is written.

A. Education level of Population
1. College and above

B. Geographical location
1. Colleges in the United States
2. Agencies and Bureaus in the United States responsible for the determination of Indian legal rights.

III. Population that is to use the material.

A. College teachers
B. Attorneys
C. Courts
D. Bureau of Indian Affairs

IV. Content of material.

A. The general nature of the relationship between the United States and the American Indian.
1. The idea of sovereignty: Cherokee Nation v. Georgia.
2. The concept of Indian tribes as domestic dependent nations: Worcester v. Georgia.
3. The protection, if any, that the First Amendment to the Constitution affords groups like American Indians, whose religio-political beliefs may differ drastically from the dominant culture.

B. Specific problems created by the unique relationship between the American Indian and the United States Constitution.
1. The potential conflict between the conduct of tribal affairs and specific Constitutional provisions.
a. The historical development of the Indian tribe's right to establish its own laws and the courts to enforce them: Williams v. Lee and Iron Crow v. Oglala Sioux Tribe.

b. The expansion of Constitutional Due Process and its implications for tribal affairs: Colliflower v. Garland.

2. Title II of the Civil Rights Act of 1968--the Indian Bill of Rights
   a. The relationship between the statute and the Constitution.
   b. Title II's implications for tribal self-government.
   c. Amendments to Title II.
3. The Concept of Citizenship
   a. The historical development of the concept of "citizenship" and its specific application to American Indians.
   b. The relationship between "citizenship" and the right to vote.
4. The Power to tax
   a. The nature of the Indian reservation's immunity to certain kinds of state and local taxation.
   b. The historical uncertainty about the scope of the power to tax by local, state and federal government and by the tribe itself.
5. Indian water rights
   a. The relationship between lands on Indian reservations, water rights and the Constitution.
   b. The scope of Indian's legal rights to water: Winters v. United States

COURSE OUTLINE

"The Native American and the United States Constitution"

I. Topics to be considered in the course

A. Session I: The Sovereignty of Native American Tribes
1. Cherokee Nation v. Georgia.
2. Worcester v. Georgia.

B. Session II: Native American Tribal Sovereignty Since Cherokee Nation and Worcester
1. Public Law 280.
2. Williams v. Lee.
3. Organized Village of Kake v. Egan.

C. Session III: Native American Tribes and Criminal Jurisdiction
1. The concept of a tribal judicial system: United States v. Clapox.
2. Types of Tribal Judicial Systems.
3. Tribal court jurisdiction.
   a. Ex Parte Crow Dog.
   b. Iron Crow v. Oglala Sioux Tribe.
4. State and federal limitations on tribal court jurisdiction.
   a. Ex Parte Reynolds.
   b. Ex Parte Kenyon.
   c. The "Major Crimes" act: United States v. Kagama.

D. Session IV: Native American Tribes and Civil Jurisdiction
1. Automobile accidents.
   a. Vermillion v. Spotted Elk.
   b. Smith v. Temple.
   c. Paiz v. Hughes.
2. Family law area.
   a. Marriage and divorce.
      1) Whyte v. Dist. Court.
      2) Kunkel v. Barnett.
      3) Department of Interior Solicitor's opinion.
   b. Custody and control of children.
      1) Department of Interior Solicitor's opinion.
      2) State ex rel. Adams v. Superior Court.

E. Session V: The Concept of Citizenship for Native Americans
1. Defining citizenship.
   a. Elk v. Wilkins.
   b. Swift v. Leach.

2. Citizenship and the right to vote.
    a. Porter v. Hall.
    b. Allen v. Merrell.
    c. Harrison v. Laveen.
3. Citizenship and the liquor laws.
    a. Matter of Heff.
    b. United States v. Nice.

F. Session VI: Native American Water Rights
1. United States v. Winters.
2. Expansion of the Winters doctrine.
    a. United States v. Powers.
    b. United States v. McIntire.
    c. Consideration of future needs: United States v. Ahtanum Irrigation Dist.
3. The quantum of water to be reserved: United States v. Walker River Irrigation Dist.
4. Political pressures and intra-governmental conflict.

G. Session VII: Native American Hunting and Fishing Rights
1. On-reservation fishing rights.
    a. Opinion of the Attorney General of Wisconsin.
    b. Elser v. Gill Net Number One.
2. Off-reservation fishing rights.
    a. United States v. Winans.
    b. Tulee v. Washington.
    c. Maison v. Confederated Tribes of the Umatilla Indian Reservation.
    d. Puyallup Tribe, Inc. v. Dept. of Game.

H. Session VIII: Native Americans and the State's Power to Tax
1. State Sales Taxes.
    a. Department of Interior Solicitor's opinion.
    b. Warren Trading Post Co. v. Arizona Tax Comm'n.
2. State taxes on Native American real property and personalty.
    a. United States v. Rickert.
    b. Your Food Stores, Inc. v. Village of Espanola.
    c. Pourier v. Shannon County.
    d. Makah Indian Tribe v. Clallum Country.
    e. Ghahate v. Bureau of Revenue.

I. Session IX: Native Americans and the Bill of Rights
1. Talton v. Mayes.
2. Development of the Talton principle.
    a. Barta v. Oglala Sioux Tribe.
    b. Glover v. United States.

c. Toledo v. Pueblo De Jemez.
d. Native American Church v. Navajo Tribal Council.
e. Collinflower v. Garland.

J. Title II: The Indian Bill of Rights.
1. The provisions of Title II.
2. Legislative background of Title II.
3. Problems with the implementation of Title II.

II. Examinations.

A. Frequency.
1. Mid-term examination (to be given following completion of material for session five).
2. Final examination.

B. Format of examinations.
1. Mid-term examination.
a. Set up a debate or debates on specific substantive questions that have been raised during the first five sessions.
b. Examine the debaters themselves on the basis of their oral presentations.
c. Examine the remainder of the class on the basis of their written critiques of the substantive points raised by the debaters.
2. Final examination.
a. A substantial paper on a specific substantive point.
b. Written examination.
1) Provide the student with a hypothetical fact situation similar to that with which a court must deal, and instruct the student to respond to the situation on the basis of the case law he has learned.
2) Provide the student with the facts of a case currently pending before a court, and instruct the student to decide the case.
c. Allow the student to fulfill his examination requirement with a part-time internship with an organization directly connected with the resolution of Native American Legal problems.

III. Materials that will be included in the bibliography for this course.
A. Case law.
B. Statutory law.
C. Government documents and publications.
D. Secondary sources.

I. The Sovereignty of Native American Tribes

A. Cherokee Nation v. Georgia

In two early decisions, Cherokee Nation and Worcester v. Georgia,[1] the United States Supreme Court established the principle that Native American tribes possessed many of the attributes of sovereign nations. In Cherokee Nation, the first of these two cases, the issue arose when the Cherokees in Georgia attempted to invoke the jurisdiction of the Supreme Court under a provision of the United States Constitution[2] that allowed the Court to hear controversies between a state of the Union and a foreign state. Thus, before it could even reach the merits of the case, the Court had to determine whether the Cherokee Nation was a "foreign state."

1. Chief Justice Marshall's opinion.

The Court resolved the issue against the Cherokees. Writing for the Court, Chief Justice Marshall did admit that the Cherokee Nation had an "unquestionable, and heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government...."[3] Nevertheless, he doubted whether "these tribes which reside within the acknowledged boundaries of the United States (could), with strict accuracy be denominated foreign nations."[4] The Chief Justice thought Native American tribes resembled "domestic dependent nations," whose relationship to the United States he likened to that of a "ward to his guardian."

The Court based this conclusion on two considerations. First, it interpreted Article I, Section 8 of the United States Constitution, which empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[5] The Court contended that this Constitutional provision referred to three discrete entities, none of which overlapped in any way with either of the other two. It explained:

> (The Indian tribes) are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into these

distinct classes--foreign nations, the several States, and Indian tribes.[6]

The Court also refused to designate the Native American tribes as foreign nations for a purely practical reason. Chief Justice Marshall contended that the tribes "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all an invasion of our territory, and an act of hostility."[7] Thus, the realities of the relationship between the Native peoples and the national government militated against any notion that the tribes were completely independent of the United States.

2. Justice Johnson's opinion.

In a separate opinion Justice Johnson maintained that with the possible exception of the United States nobody recognized the Cherokees as a "state." This conclusion was based on the fact that the Indians had only rights of occupancy and did not hold title to their lands. The United States actually held title, which meant the Native Americans could not alienate their lands without permission from the federal government.[8]

Justice Johnson attempted to buttress his position by citing the provisions of a treaty between the United States government and the Cherokee Nation.[9] He claimed that the language made it difficult

> to think that (the Cherokees) were then regarded as a state, or even intended to be so regarded. It is clear that it was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with the unquestioned rights of the States, or United States, over the territory within their limits.[10]

Justice Johnson expressed considerable concern about the practical implications of designating the Cherokees as a "nation." He feared that "every petty Kraal of Indians....having a few hundred acres of land to hunt on exclusively....(would be).... recognized as a state." Such an event would force into the family of nations an unmanageably "numerous and....heterogenous progeny."[11]

3. Justice Thompson's opinion.

Finally, Justice Thompson rejected the opinions of both Chief Justice Marshall and Justice Johnson. He contended that the Cherokee Nation was clearly a "sovereign state." The Cherokees' "political condition" determined their foreign character. Measured by this test, the Cherokees had been"treated as a people governed solely and exclusively by their own laws, usages and customs within their own territory, claiming and exercising exclusive dominion over the same, yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereigny and self-government over what remained unsold."[12] Furthermore, the fact that the state of Georgia surrounded the Cherokee Nation did not determine whether the Cherokees were a "foreign state." Analysis should focus on "political condition," not "geographical condition."[13] Finally, Justice Thompson refused to be influenced by the fact that the relationship between the federal government and the Cherokees was an "unequal balance." Since the Cherokee Nation, which he admitted was a "weak" state, had placed itself under the protection of a stronger one without stripping itself of the right of government and sovereignty, it had not forfeited its position among sovereign states.[14]

The Cherokee Nation decision established a number of broad guidelines on the question of Native American tribal sovereignty. The Supreme Court rejected the notion that the tribes were "foreign states" within the meaning of the Constitution, but neither were the Native peoples totally non-sovereign entities relegated to a position of complete subordination to the United States. Rather, they were "domestic dependent nations" that possessed many of the attributes of sovereign states. It remained for later Supreme Court decisions to give more content to this somewhat elusive concept.

B. Worcester v. Georgia[15]

In Worcester the Surpeme Court elaborated on the position it had outlined in Cherokee Nation. The Cherokee government had permitted Worcester, a New England missionary, to enter Cherokee territory. This act, however, violated a Georgia statute that prohibited anyone's entering Cherokee territory without Georgia's permission.[16] The Georgia authorities promptly jailed the missionary. Worcester and the Cherokee Nation contended the state of Georgia had no power to extend its jurisdiction over Cherokee territory.

1. Chief Justice Marhsall's opinion.

Chief Justice Marshall, again writing for the Court, reiterated several of the points he had made in Cherokee Nation. He indicated that the tribes had many of the attributes of sovereign states. He cited the fact that Great Britain had considered the Native American tribes capable of maintaining the relations of war and peace, and of governing themselves under her protection. Furthermore, Great Britain had made treaties with them, the obligations of which she acknowledged.[17] Justice Marshall also pointed out that treaty language did not support the assertion that Cherokees were "individuals abandoning their national character, and submitting as subjects to the laws of a master."[18]

However, the facts in Worcester required the Court to go beyond these general propositions to a consideration of the specific relationship between the Cherokee Nation and the state of Georgia. The Court decided that: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States...."[19] Chief Justice Marshall explained that

> The Cherokee Nation...is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.[20]

2. Justice McLean's opinion.

Justice McLean also maintained that the Cherokee Nation possessed "many of the attributes of sovereignty," but he considered many aspects of the Marshall opinion to be slightly fictional. His statements contained a profoundly prophetic description of the Native American tribe's future as a sovereign nation. First, he observed that the exercise of the power of self-government by Native Americans within a State was probably transitory. "...A sound national policy," he stated, "does require that the Indian tribes within our States should exchange their territories upon equitable principles, or eventually consent to become amalgamated in our political communities."[21] Second, he also concluded that should Indians residing in a state ever become incapable of government themselves, either

"by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the aegis of its laws."[22] Justice McLean may have misjudged the means by which the result was to be achieved, but he correctly predicted the result itself.

3. The principles of Cherokee Nation and Worcester.

Cherokee Nation and Worcester established a number of important principles. First, although Native American tribes could not be designated sovereign states, they did have many of the attributes of sovereignty. Their political status lay somewhere between full sovereignty and complete subordination. Chief Justice Marshall coined the term "domestic dependent nation" to describe this concept. Second, Worcester made clear that as to the states, the Native peoples were clad with virtually all the prerogatives of sovereign entities. The states were prohibited by the Constitution from asserting jurisdiction over any of the Native American nations' affairs in the absence of a specific Congressional act. Thus, the Worcester Court concluded that it was the federal government that possessed the constitutional right to regulate the affairs of Indian people.

These two cases did not require the Court to expand upon this principle, but it eventually became clear that with few exceptions the federal government's powers of regulation were virtually plenary. The Cherokee Nation and Worcester decisions represented the high-water mark for the concept of Native American tribes as sovereign entities. Since these historic pronouncements, the Surpeme Court has, often somewhat grudgingly and frequently over the strong dissents of its own members, softened the rigor of Chief Justice Marshall's words.

II. Native American Tribal Sovereignty Since Cherokee Nation and Worcester

The concept of sovereign Native American tribes hardly commanded a universal following in the United States. Congress attacked the idea in its Indian appropriations bill for 1871 which declared that "hereafter no Indian nation or tribe shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[23] The act also provided that any treaties previously entered into by the United States and Native peoples would not be impaired, but the act clearly constituted a telling assault on the idea that tribes deserved to be treated like sovereign states.

A. Public Law 280[24]

Public Law 280 represented the most direct attack on the concept. While the states themselves do not possess the power to extend their jurisdiction over the tribes, the federal government does have the authority to permit states to assert such jurisdiction. Congress exercised this power with the passage of Public Law 280. Section 2[25] of this act extended state criminal jurisdiction over most reservations in a number of states and section 4[26] contained an identical provision affecting state civil jurisdiction. Most important, Public Law 280 allowed "any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both...to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."[27]

The jurisdictional powers a state has over Native American tribes when Congress has not spoken represents an even more difficult problem. Considerable authority exists for the proposition that a tribe is not subject to state jurisdiction absent a specific treaty provision or Congressional act. However, the following recent Supreme Court decisions have left this area unsettled.

B. Williams v. Lee[28]

In Williams a white general store owner, whose trading post was located on the Navajo reservation, sued the two Navajo defendants for unpaid bills in a state court. The Navajo defendants contended that the state court had no jurisdiction, but the Arizona trial and appelate courts had decided this issue against the defendants.[29]

Writing for the Court, Justice Black upheld the defendants' contention and reversed the state court. He relied heavily on Cherokee Nation and Worcester, pointing out that the policy of Worcester, which prohibited the state from exercising jurisdiction over reservation, should be departed from only where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized..."[30] Applying this test to Williams, Justice Black concluded that "to allow the exercise of state jurisdiction...would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[31] The Court's test contains a number of weaknesses. First, it represents a softening of the Worcester holding. That case declared that only a federal act or treaty could extend state jurisdiction over Native American tribes,[32] but the Williams holding would allow such an extension if its test were satisfied. Second, the Williams test can be much more easily subverted than the Worcester criterion. This stems from the lack of objective content in the phrase "essential tribal relations," and to the extent the test becomes subjective or ad hoc it may be manipulated by courts.

C. Organized Village of Kake v. Egan[33]

Kake provides an example of the problems with the Williams test. In Kake the Supreme Court had to decide whether an Alaska fishing law should apply to a village of Native Americans. The Court invoked the Williams test in order to reach a result. This time, however, the Court held that imposition of the state law would not "interfere with reservation self-government or impair a right granted or reserved by federal law."[34] Measured in terms of "reservation self-government," it is hard to distinguish Kake from Williams.

More important, the dictum in Kake damages the concept of Native American tribal sovereignty. As a general assumption the Court offers the following proposition:

> The relation between the Indians and the United States has by no means remained constant since the days of John Marshall.
>
> ....
>
> As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as part of our country.[35]

The Court also pointed out that disclaimer clauses in State enabling legislation were disclaimers of "proprietary," and not "governmental" interest in Native American tribes.[36]

This line of reasoning clearly departs from the spirit, if not the letter, of the earlier Marshall opinion. Kake represents a relaxation of the notion that state law penetrates a reservation only to the extent authorized by treaty provision or Congressional act. Thus, Kake may stand for the proposition that states need only satisfy the rather flexible Williams test in order to extend their jurisdiction over Indian reservations.

D. Conclusion

Cherokee Nation and Worcester established the guidelines for dealing with the question of Native American tribal sovereignty. In Worcester, the Supreme Court stated that the federal government, and not the states, was constitutionally responsible for the affairs of the tribes. The Court specifically proscribed any state interference with the exercise of tribal sovereignty in the absence of a specific Congressional act or treaty provision. However, the Williams and Kake decisions have cast doubt on the continuing validity of these principles.

III. Native American Tribes and Criminal Jurisdiction

A. The Concept of a Tribal Judicial System

A natural extension of sovereignty was the Native American tribe's right to establish its own laws and the means with which to administer those laws. Although acknowledging the general validity of this principle, the federal government actively intervened in the tribal judicial processes, more often than not displacing traditional mechanisms with Anglo-American models. By the late nineteenth century the Department of Interior had established Indian police forces, Indian courts, and sets of laws and regulations for the reservations.[37] In United States v. Clapox[38] the defendants, who had been placed in the tribal jail for violating a tribal law that made it a crime to "rescue a person who is in jail," challenged the constitutionality of the tribal court system. Defendants contended that under the United States Constitution[39] only Congress, and not the Department of Interior, had the power to establish courts on reservations.

The Supreme Court disagreed, holding that "these 'courts of Indian offenses' are not the constitutional courts provided for in article 3, section1 .... which congress only has the power to 'ordain and establish', but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian."[40] Thus, in the name of "education" and "civilization" these courts withstood constitutional attacks.

B. Types of Tribal Judicial Systems

Since Clapox a number of different kinds of reservation court systems have developed. In fact, the "Courts of Indian Offenses," the constitutionality of which the Clapox Court sustained, now number only twelve and exist only where a tribe has not provided for its own judicial structure.[41] Normally, either "traditional courts" or "tribal courts" perform the judicial function on reservations. The former are limited almost exclusively to the Pueblos in the southwestern United States. Tribal courts, the most numerous of the three models, are subject to no federal regulations, and of late have become almost completely independent of either state or national governments.[42]

The Navajo tribal court provides an example of this evolution. Originally, the Commissioner of Indian Affairs appointed the judges for the tribal courts, and their salaries were paid out of federal funds. In 1950, the Navajo Tribal Council agreed to assume responsibility for the judges' salaries and their selection.[43] One observor has concluded that after a

decade of operation "The . . . courts are clearly and exclusively the judicial branch of the Navajo Nation and are free from control of the Department of Interior or any other agency of the federal government."[44]

C. Tribal Court Jurisdiction

Once tribal courts are established, there still remains the difficult task of defining the court's jurisdiction. Over whom and over what matters may a tribal court assert jurisdiction? One can easily imagine a variety of hypothetical fact situations. What if the crime is committed on the reservation by one Native American against another? What court has jurisdiction if a Native American commits a crime off the reservation? May a tribal court assert jurisdiction over an offense perpetrated on the reservation by a non-Native American?

Those fact situations at the extremes of the range of possibilities can be disposed of most easily. First, courts almost unanimously agree that a Native American who commits a crime off the reservation subjects himself to the laws of the state in which he commits the criminal act.[45] Second, with a number of important exceptions tribal courts have retained jurisdiction over offenses committed on a reservation by one Native American against another.

1. Ex Parte Crow Dog[46]

Crow Dog illustrates the validity of the second proposition. Crow Dog, a member of the Brule Sioux Nation, had been convicted in a territorial court of murdering Spotted Tail, another Brule Sioux. The petitioner, Crow Dog, challenged the conviction, contending the territorial court did not have jurisdiction over him. The Supreme Court agreed with the petitioner, pointing out that neither United States statute nor the Sioux Treaty of 1868 could be interpreted to extend the jurisdiction of the territorial court over tribes to a crime committed by one Native American against another on a reservation.[47]

2. Iron Crow v. Oglala Sioux Tribe.[48]

The court reached a similar conclusion in Iron Crow, which contained a slight factual variation on Crow Dog. Appellants, all of whom were members of the Oglala Sioux Tribe, had been convicted of adultery in the Sioux Tribal Court. They appealed to a federal court contending that the tribal court did not have jurisdiction to try and convict them of adultery, and that the imposition of tribal court sentences thus deprived them of liberty without due process of law.

The circuit court rejected the appellants' arguments. It

stated that the tribal courts retained inherent jurisdiction over all criminal matters not affected by specific federal legislation. In fact, the court believed that federal legislative action actually supported the authority of the tribal courts.[49]

Iron Crow contained a more complex fact situation than Crow Dog, because between the two decisions Native Americans had been made United States citizens. Appellants in Iron Crow contended that one could not hold American citizenship and still be subject to the jurisdiction of a tribal court. The circuit court did not agree, and pointed out that in granting Indians United States citizenship, Congress evidenced no intention to destroy tribal existence or the jurisdiction of Indian tribal courts.[50]

D. State and Federal Limitations on Tribal Court Jurisdiction

The criminal jurisdiction of tribal courts can be limited by federal legislation. Congress has accomplished this limitation in a variety of ways. First, Congress can empower the states to extend their criminal laws over the tribes.[51] Second, legislation can limit the persons over whom tribal courts exercise jurisdiction.[52] Finally, Congress can restrict the substantive offenses that may be brought before a tribal court.[53]

1. Ex Parte Reynolds.[54]

Federal legislation specifically deprived tribal courts of jurisdiction over crimes committed on a reservation that involved a white victim or defendant. State and federal courts sometimes tortured the facts of a case to bring a white defendant within the federal statute's coverage. For example, in Reynolds, the Choctaw tribal court had based its jurisdiction over the defendant, Reynolds, on the finding that both Reynolds and Puryear, the murder victim, were "Choctaws by marriage." In a tortuous decision, the federal court overturned this argument by determining that Mrs. Puryear's paternal grandfather had been a United States citizen, thus making Mrs. Puryear a United States citizen. This being so, it was impossible for Mr. Puryear to have "married into the Choctaw tribe." Since the victim was a United States citizen, and not a Choctaw, the federal court had jurisdiction of the case.[55]

2. Ex Parte Kenyon.[56]

In Kenyon, the petitioner, who had been convicted of larceny in a Cherokee court, filed a writ of habeas corpus in

a federal court. The court granted the writ, denying that the Cherokee court had jurisdiction of either the subject matter or the person. First, the court found that the offense had occurred in the state of Kansas and not in Cherokee Nation. Second, the court stated that the offender held U. S. citizenship. Thus, the Cherokee court had no jurisdiction over the case.

3. The "Major Crimes Act."[57]

In the "Seven Major Crimes Act" Congress withdrew a number of offenses from tribal courts' criminal jurisdiction. The legislation provided that

> all Indians committing against the person or property of another Indian or other person any of the following crimes . . . murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject . . . to the laws of such Territory relating to said crimes . . .[58]

Since its passage the Act has been amended to include a number of additional offenses: assault with a dangerous weapon;[59] incest;[60] robbery;[61] carnal knowledge of any female, not his wife, who has not attained the age of sixteen years;[62] assault with intent to commit rape;[63] and assault resulting in serious bodily injury.[64]

Although the"major crimes" are prosecuted in federal courts, a number of the offenses under the Act are defined by state laws. A 1966 amendment to the Act provided that the offenses of rape and assault with intent to rape should be defined in accordance with the laws of the state where the offense was committed.[65] Furthermore, the offenses of burglary, assault with a dangerous weapon, and incest should be both defined and punished by reference to the laws of the state where the offense was committed.[66]

In United States v. Kagama[67] the defendants challenged the constitutionality of the "Major Crimes Act." The Native American defendants were charged in a federal court with the murder of another Native American on the Hoopa Valley reservation. The defendants demurred to the indictment, contending that Congress was not competent to grant federal courts juris-

diction over the matter. The Supreme Court found that Congress was fully competent to enact legislation affecting the Native American tribes. Congress possessed this power because the "Indian tribes [were] the wards of the nation . . . and . . . communities dependent on the United States."[60]

E. Conclusion

Historically, Indian tribal courts exercised jurisdiction over almost all criminal offenses committed on the reservation. However, Congress had the power to limit this jurisdiction in a number of ways. Congress has exercised this power by allowing states to extend their criminal jurisdiction over reservations, by restricting the persons over which tribal courts could exercise jurisdiction, and by transferring jurisdiction for a number of "major crimes" from the tribal courts to federal courts. Consequently, at the present time tribal courts have jurisdiction primarily over only minor offenses.

IV. Native American Tribes and Civil Jurisdiction

In many respects the problems posed by questions of civil jurisdiction are similar to those in the area of criminal jurisdiction. Many of the cases involving civil actions also are determined by whether the plaintiff and/or defendant are Native Americans and whether the event giving rise to the cause of action occurred on reservation.

A. Automobile Accidents

1. Vermillion v. Spotted Elk.[69]

Actions arising from automobile accidents frequently present the questions mentioned above. In Vermillion the plaintiff and defendant, both members of the Standing Rock Sioux tribe, were involved in an automobile accident on the Standing Rock Sioux reservation. Vermillion brought the action in a state court. Spotted Elk contended the state court had no jurisdiction because of the facts of the case.[70]

The defendant relied heavily on a provision of North Dakota's Enabling Act disclaiming any interest in Indian lands within its borders. The North Dakota supreme court responded to this contention by stating that the Enabling Act clause was not intended by Congress to prohibit state jurisdiction of civil actions that had no relation to Indian lands. Therefore, this action was properly in a state court.[71]

2. Smith v. Temple.

In Smith v. Temple, the facts of which were exactly like those in Vermillion, the supreme court of South Dakota reached the opposite result. In fact, the court specifically rejected the Vermillion holding. The court reasoned that since South Dakota had not assumed jurisdiction under Public Law 280, state courts did not have jurisdiction over a Native American defendant in a cause of action arising on a Native American reservation. The court based this conclusion on the following statement: " 'Significantly, when Congress has wished the state to exercise this power it has expressly granted them the jurisdiction which Worcester v. State of Georgia had denied.' " 73

3. Paiz v. Hughes.

The fact situation in Paiz distinguishes itself from Vermillion and Smith on several grounds. The suit involved actions for personal injury and wrongful death in an accident on a state highway within the territorial limits of the

Jicarilla-Apache reservation. The state of New Mexico had an easement over which it had constructed and maintained the highway on which the accident occurred, but the underlying ownership of the land remained in the Jicarilla-Apaches. The decedent and plaintiffs were members of the tribe and lived on the reservation. However, in contrast with Vermillion and Smith the defendant was not a Native American and did not live on the reservation. Nevertheless, the defendant contended that the facts of the case precluded the assumption of jurisdiction by a New Mexico state court.[75]

The Court rejected the defendant's contention and held that the trial court had jurisdiction of the plaintiffs' causes of action. It indicated that tribal Native Americans had the right to invoke state court jurisdiction in matters that affected neither the federal government nor tribal relations; the court placed this case in that category.[76]

The defendant also raised the issue of New Mexico's constitutional disclaimer of any right or title to Indian land within its borders. The court, echoing Kake and Vermillion, pointed out that the provision was a disclaimer of proprietary, not governmental interest.

B. Family Law Area

1. Marriage and divorce.

Whyte v. Dist. Court.[77]

In Whyte, the respondent, a member of the Ute Mountain tribe, had sued the petitioner, a member of the same tribe, for divorce in a Colorado state court. The defendant-petitioner had objected, maintaining that only the Ute tribal court had jurisdiction since the Utes were a treaty tribe and Colorado had not extended its jurisdiction under Public Law 280. The trial court had overruled the petitioner's objection.

The appellate court, relying on Williams, reversed the trial court. The respondent had argued that the Colorado constitution contained no disclaimer of interest in Native American tribes, but the court believed the decision turned on Public Law 280. "The test," it stated, "is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such jurisdiction within the state."[78] Since Colorado had not taken the prerequisite steps under Public Law 280, it could assume neither criminal nor civil jurisdiction over tribal Native Americans.

Kunkel v. Barnett.[79]

A related question focuses on what recognition should be accorded marriage and divorce by tribal usage and custom. In Kunkel a federal court upheld such marriages and divorces, but it carefully outlined the conditions under which they should be recognized. First, the Native Americans involved must live together under the tribal relation. Second, they must not be subject to the jurisdiction of the state in which they reside. Finally, the paramount federal law must not have placed any limitations on the tribal members' management of their domestic relations.[80]

Department of Interior Solicitor's opinion.[81]

In a Solicitor's opinion the Department of Interior agreed with the court's holding in Kunkel and proceeded to expand the concept of Indian marriage and divorce by usage and custom. The opinion was requested when the estate of Noah Bredell, a tribal Nez Perce, became embroiled in controversy. Lillie Viles, to whom Bredell had been married by ceremony, was excluded from the estate because she had separated from her husband under circumstances that constituted a valid Native American custom divorce.

Miss Viles contended that since she had been married by ceremony rather than custom, only a divorce in accordance with state law could dissolve the bond. The Solicitor rejected this contention and held that a custom divorce sufficed even where there had been a ceremonial marriage. The opinion concluded:

> It is for Congress alone to say when the customs in question shall cease. Bills have repeatedly been introduced in Congress having in view the abolishment of Indian custom and divorce, and subjecting the Indians to the laws of the State, but none of these was ever enacted. The introduction of these bills implies recognition by Congress that State marriage and divorce laws are not applicable or controlling in the matter of tribal custom marriage and divorce.[82]

All of these opinions state that the federal government has the power to modify or abolish marriage and divorce by custom and usage. It could do so either through direct legislation or measures like Public Law 280, which allows states to assume civil jurisdiction under certain circumstances.

2. Custody and control of children.

Department of Interior Solicitor's opinion.[83]

The Solicitor's opinion was requested in a case where a tribal court had terminated the parents' right to their child and thereafter turned the child over to a state court for the purpose of invoking state adoption procedures. The Solicitor had to decide whether the state court had jurisdiction notwithstanding the fact that the case involved a Native American who lived on a reservation.

The Solicitor believed that the "transcedant concern must be the welfare of the (child)."[84] The Solicitor further observed that the utilization of state programs to secure the adoption of dependent Indian children should "not be deterred by the interposition of baseless legal objection."[85] The opinion supported state jurisdiction in this case by noting that the touchstone of jurisdiction was the subject matter, not the personal status of the individual involved or the situs of the activity.

The opinion concluded:

> The test of the propriety of state action . . . is whether it interferes with powers reserved to the tribes . . . Clearly, the activity of the state courts in the situation posited does not interfere with reservation self-government. . .Adoption proceedings on behalf of an Indian child under the circumstances presented. . .does not involve trespass upon any area reserved to the exclusive cognizance of the Federal or tribal governments.[86]

State ex rel. Adams v. Superior Court.[87]

The general issue raised in the Solicitor's opinion was posed more sharply in State ex rel. Adams v. Superior Court.[88] The appellate court had to decide whether a state juvenile court had jurisdiction over minors who were enrolled members of the Colville tribe and lived on the Colville reservation. The parent-relator contended that the state courts had no jurisdiction over the children.

The Washington supreme court upheld the parent's contention. The court rejected the notion that state possesses residual jurisdictional powers, and concluded that Congress had exclusive jurisdiction over the affairs of enrolled Native Americans on reservations. After the enactment of Public Law 280

Washington had passed a law providing that the state would assume jurisdiction only if the tribes wanted it to. The court could find no indication that the Colville tribe wanted state jurisdiction extended to their reservation.

The superior court had contended that it had jurisdiction because the relator lived on an "allotment" rather than a "reservation." The Supreme Court disposed of this issue by pointing out that the title to the allotment upon which the children resided rested in the United States government, and according to the compact clause of the state constitution, the United States had exclusive jurisdiction over such lands.[89]

C. Conclusion

Courts have refused to agree on a common set of principles in this area of law. Some states are unwilling to assume jurisdiction unless they have received a specific mandate from Congress, such as Public Law 280. Other courts, usually drawing on Kake and Williams, have been less circumspect about extending their jurisdiction to reservations.

V. The Concept of Citizenship for Native Americans

A. Defining Citizenship

Because of the Native American's historic relationship to the states and the federal government, it was difficult to determine when, if ever, the rights and privileges of United States citizenship attached to individual Native Americans. Congressional legislation passed in 1924[90] and 1940,[91] which extended United States citizenship to Indians, finally mooted this question. But the litigation that occurred prior to this legislation reflects the dramatic tension between guardianship and assimilation.

1. Elk v. Wilkins.[92]

The Supreme Court first grappled with this issue in Elk. The plaintiff's success turned on whether he was a "citizen" within the meaning of the Fourteenth Amendment. The Court had to decide whether a person, born a member of a Native American tribe, could by reason of birth within the United States and voluntary separation from his tribe become a United States citizen.

The court rejected the plaintiff's claim of citizenship on several grounds. First, it stated there was no evidence that the United States had accepted the plaintiff's "surrender to citizenship." Second, he offered no proof that he had been naturalized, taxed, or in any other way treated as a citizen. Finally, the Court indicated that no treaty or statute supported the plaintiff's claim. Thus, the Supreme Court concluded that "the alien and dependent condition of the members of the Indian tribes could not be put off at their will, without the action or assent of the United States."[93] The Court supported its conclusion by pointing out that since the ratification of the Fourteenth Amendment Congress had passed several acts that naturalized Native Americans of certain tribes. These acts would have been superfluous had it been possible for Native Americans to become United States citizens without any action by the Federal government.[94]

Two of the Justices, who felt the claim of citizenship was meritorious, dissented from the majority opinion. They first pointed out that the State of Nebraska taxed Elk, which in their minds clearly brought the plaintiff within the gambit of the Fourteenth Amendment. Second, they felt the legislative history of the amendment showed that Congress intended to give citizenship to every Indian who was unconnected with any tribe and who in good faith resided outside the reservation and within one of the states or territories of the Union.[95]

2. Swift v. Leach.[96]

In Swift the North Dakota Supreme Court also considered the question of citizenship, but with an important variable added. The North Dakota Burke Act had made it possible for Native Americans to become citizens if they "assumed all the attributes of civilized life."[97] Unfortunately, the statute did not define precisely what these attributes were, so the court was left to its own devices to give meaning to the provision. This gave the courts tremendous discretion in determing which Native Americans became citizens. The Supreme Court felt the most important criteria were: 1) literacy level; 2) church membership; 3) active interest in governmental affairs; and 4) "desire to be like a white man."[98] The court concluded that the plaintiffs had satisfied this set of requirements:

> Over these Indians there are no chiefs, either hereditary or appointed.
> There is no showing that these Indians follow any customs commonly pursued by Indians; they do not lead a nomadic or wandering life; they have homes and fixed abodes; they are engaged in the pursuit of agricultural industry; they live intermingled with the whites, having adopted and followed their customs.[99]

The court's decision actually conflicted with Supreme Court authority. Elk had held that Native Americans could not claim citizenship before Congress, by act or treaty, had granted it. In Swift it was a state statute that had conferred citizenship. The North Dakota court disposed of this problem by saying that no federal authorities had "voiced opposition to the act." Furthermore, it believed the state law complemented rather than conflicted with federal law since the avowed federal policy was to "assist the Indian."[100]

B. Citizenship and the Right to Vote

Whether a Native American could successfully claim citizenship had very real implications. A number of Native Americans who had voluntarily joined white society wanted to vote in elections, and only United States citizens could register to vote. In Elk the plaintiff had been denied the franchise because the court said he was not a citizen.

1. Porter v. Hall[101] and Allen v. Merrell.[102]

Ironically, even after the Citizenship Act of 1924, some states continued to deny reservation Native Americans the right to vote. In a fairly recent decision, Allen v. Merrell,[103] the Utah Supreme Court upheld the constitutionality of a statute that disfranchised reservation Native Americans.[104] In Porter the Arizona Supreme Court reached a similar result. It based the holding on an Arizona statute that prevented any person in a state of "guardianship" from voting. The court placed Native Americans in this category and relied on Elk to say that only Congress could terminate this relationship.[105]

2. Harrison v. Laveen[106]

In Harrison, the Supreme Court of Arizona finally overruled Porter. The majority in Harrison concluded that Native Americans were not "persons under guardianship" within the meaning of the Arizona constitution and were, therefore, entitled to the franchise. The court reached this result by listing the characteristics of "guardianship" and demonstrating that Indians did not fit the category, which was obviously drafted with mental incompetents and the insane in mind.[107]

The confusion in the franchise stems at least partly from the ambiguous relationship between United States citizenship and federal "guardianship." The conferring of United States citizenship did not terminate all forms of guardianship. For example, although an "allotment Indian" was a United States citizen and, therefore, subject to state "police regulations," the federal government nevertheless maintained a number of controls over allotted lands. Some states with a guardianship statute like Arizona's seized upon this fact to justify denying the franchise to Native Americans. Several things flaw this curious line of reasoning. First, as the Harrison court convincingly pointed out,"guardianship" statutes were never intended to encompass Native Americans. Second, the Worcester decision, which many courts use to support the "guardianship" argument, does not really even say that the United States literally serves as the Native American's guardian.

C. Citizenship and the Liquor Laws

A lighter example of the confusion over United States citizenship involved a federal statute that prohibited the sale of liquor to Indians and subjected offenders to punishment by imprisonment.[108]

1. Matter of Heff.[109]

In Matter of Heff[110] the petitioner had been charged

under the federal liquor law. As a defense, Heff claimed that the Native American to whom the liquor had been sold was an allottee, a Kansas citizen, a United States citizen, and subject to the civil and criminal jurisdiction of the state, and thus should not be considered a Native American for purposes of the federal statute.

The court agreed with the petitioner's contention. When the United States government granted citizenship to a Native American and gave criminal and civil jurisdiction to a state, the emancipation of federal control could not be put aside at the instance of the government without the consent of the state and the individual Native American, notwithstanding the fact that the Native American's allotment was held in trust by the federal government.[111]

2. United States v. Nice.[112]

In Nice the Supreme Court overruled its decision in Heff. Nice had been convicted under that part of the federal statute that prohibited the sale of liquor to "any Indian to whom allotment of land has been made while title to land is held in trust by the government . . ."[113] The defendant alleged that in passing the law Congress had exceeded its power.

The Court stated that despite the General Allotment Act's grant of citizenship to allottees, the tribal relation continued during the twenty-five year period in which the allottee's land was held in trust by the federal government. Thus, during this period the Native American allottee maintained citizenship and tribal status, and if the latter existed, Congress could make laws affecting the sale of liquor to such Native Americans.

D. Conclusion

The cases in this area of Indian law reflect the confusion surrounding the concept of United States citizenship for the Native American. It is difficult to find any approaches that commanded a unanimous following among the courts. The first problem was to determine when citizenship attached to the Native American. After this hurdle was cleared, it was still unclear what rights flowed from United States citizenship. The only safe conclusion is that citizenship did not mean the end of all federal control over Native Americans. This meant that courts often felt justified in denying the Native American privileges of citizenship, such as the franchise. Fortunately, most of these cases are now judicial museum pieces, but they serve as a reflection of the profound conflict during the

late nineteenth century when the United States could not decide whether to assimilate Native Americans or continue to treat them as wards of the federal government.

VI. Native American Water Rights

A. The Winters Doctrine

Historically, water rights have been property rights that attach to Native American reservation lands. These rights encompass not only the waters on the reservation, but also the sources of the water, which may be located far from the reservation. Because water rights are property rights, they fall within the ambit of Fifth Amendment protection. More important, Native American water rights are federal rights and therefore cannot be taken through the states' power of eminent domain.[113a]

1. United States v. Winters.[114]

In Winters the United States sought to restrain the defendants and others from constructing or maintaining dams or reservoirs on the Milk River in Montana. The defendants had diverted large amounts of the Milk River to irrigate lands outside the Fort Belknap Reservation. They claimed that their interests were paramount to the interests of the United States and the Native Americans except as to 250 inches of the Milk River for use in and around the agency buildings. The defendants further contended that if they were not permitted to divert water, the communities they had built up would literally wither away.

The case turned on the agreement of May, 1888, which had created the Fort Belknap Reservation. The specific question was whether the Native Americans had forfeited certain water rights to the Milk River when they agreed to live on a smaller parcel of land. The court held that they had not. The majority opinion concluded that at the time the treaty was signed the Native Americans had impliedly reserved the right to use water flowing through or adjacent to the reservation.[115]

B. Expansion of the Winters Doctrine

1. United States v. Powers.[116]

The Winters doctrine has been consistently expanded to include additional categories of persons who can assert the water rights. In Powers the United States sought to enjoin owners of certain tracts of land in the Crow Indian Reservation from using any water from two streams on the reservation. The lands in question were Native American allotments that had been

sold in fee to the respondents. The trial court had refused to grant the federal government's request for an injunction.

The respondents contended that under the Treaty of 1868 waters on the reservation were reserved for the equal benefit of tribal members. The respondents further reasoned that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the new owners. The Supreme Court agreed with respondents' contentions, and with this decision established the principle that successors in interest to the land could reply upon the implied reservation of waters.[117]

2. United States v. McIntire.[118]

The United States and the Flathead Irrigation District appealed from a decree that the appellees were entitled to divert waters from Mudcreek, which was situated in Montana on the Flathead Indian Reservation. The decree also enjoined the appellants from interfering with this right in any way whatever. In affirming the trial court decision, the Ninth Circuit held that these rights could be held in severalty, and the water could be used by the Individual tribal members as needed.[119]

3. Consideration of future needs.

In United States v. Ahtanum Irrigation Dist. the facts were very similar to the facts in Winters. The court, relying on Winters, held that the Treaty of 1855 reserved to the Yakimas rights in Ahtanum Creek. The court also pointed out that the reservation was not merely for present, but also for future use: "The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil."[121] This holding was recently reaffirmed in Arizona v. California.[122]

C. The Quantum of Water to be Reserved

Even after the Native American's right to water is established, there remains the important question of how much water is reserved. The Ninth Circuit opinion in Winters used the "present needs" test. According to this criterion, the actual use of water by Native Americans up to the time of the court's decision was regarded as material, if not controlling. This test has not been employed frequently, and courts have looked elsewhere for formulas.

1. United States v. Walker River Irr. Dist.[123]

The opinion in Walker River contains an extensive treatment of this issue. In Walker the United States brought suit to restrain an irrigation district from interfering with the natural flow of the Walker River to the extent of 150 cubic feet per second to and from the Walker River Indian Reservation in Nevada. The government, arguing on behalf of the Native Americans, proposed that the water be reserved "to the extent necessary to supply the irrigable lands on the reservation."[124]

The Ninth Circuit rejected the government formula. "The area of irrigable land included in the reservation," the court stated, "is not necessarily the criterion for measuring the amount of water reserved. . .The extent to which the use of the stream might be necessary could be demonstrated only by experience."[125] The court did not explain precisely how this "experience" test should be implemented, but it offered two general considerations. The court might first determine the amount of acreage under cultivation over a time span. It might also look to statistics on the Native American population living on the reservation and the number of Native Americans engaged in farming.

There is little doubt that the "irrigable acreage" test would probably result in a more generous reservation of water for Native Americans than the Walker River "experience" test. However, the first test does not lend itself to quantification as easily as the second. For this reason many commentators, and[126] most courts have opted for the "experience" test.

D. Political Pressures and Intra-governmental Conflict

The generosity of courts in the water rights area belies what has often actually happened. The gap between principle and reality is caused by two factors. The first is conflict within the United States government.[127] For example, the Bureau of Indian Affairs, which is charged with protecting Native American rights, is but one of several bureaus in the Department of Interior. Others include the Bureaus of Land Management, Reclamation, and Fish and Wildlife. On the question of Native American water rights these bureaus are often openly at odds with one another. The Solicitor's office of the Department of Interior, which handles the legal affairs for all the bureaus, must often trade off the interests of one bureau against another. Unfortunately, Native Americans frequently get lost in the shuffle.

Political pressure constitutes the second obstacle to the full implementation of Native American water rights. The Ahtanum case contains an arresting example of this problem. In the spring of 1908 an Indian Irrigation Service engineer negotiated an agreement with a number of white, off-reservation users. In the agreement use of 75 percent of Ahtanum Creek was given to whites and 25 percent to Yakimas. In 1912 individual Yakimas wrote to the Attorney General of the United States questioning the validity of the 1908 agreement and urging the federal government to institute a suit to determine their rights in both the Yakima River and Ahtanum Creek.[128]

The suit was delayed because a bill was then pending in Congress that would supposedly have resolved the Yakima water rights. Actually, the bill had nothing to do with Ahtanum Creek waters. At this same time a Department of Justice attorney drafted a memorandum that reached the following conclusion: "I have gone into this matter with considerable care and am impressed with the legal soundness of the argument presented by the Yakima Indians, but the Interior Department is responsible for whatever action detrimental to their rights has been taken. . ."[129]

In 1918 the Superintendent of the Yakima Reservation advised the Commissioner of Indian Affairs that white users along the Ahtanum Creek were not living up to their end of the bargain and that he therefore felt no obligation to. In 1923 the Chief Engineer in charge of Indian Irrigation recommended that the Commissioner consider an action to adjudicate rights in Ahtanum Creek. In correspondence with the Commissioner in 1927 the Superintendent of the Yakima Reservation stated that the 1908 agreement was only temporary and had never been obeyed by the whites anyway. On the basis of this information the Commissioner concluded that the 1908 agreement was invalid and directed the superintendent to "see that the Indians received the quantity of water which they needed."[130] A timely intervention by Senator Jones of Washington resulted in the suspension of this order.

In 1930 the First Assistant Secretary of the Interior reported to the United States Attorney General that the Bureau of Indian Affairs had torn apart a dam constructed by white users across Ahtanum Creek. The following year the First Assistant Secretary urged the Attorney General to institute a suit to quiet title to the waters of Ahtanum Creek. The Department of Justice subsequently directed the United States Attorney in Spokane to prepare a bill of complaint. Senator Jones again intervened, saying that white users and the Native

Americans had reached a working agreement for the 1932 season. On the strength of this assurance the Secretary of Interior recommended that the suit be delayed. In 1933 Secretary of Interior Ickes requested that the Attorney General proceed with a suit to settle the Ahtanum Creek water rights. This time Senator Dill of Washington prevented the suit. In 1938 the United States Attorney in Spokane requested authority to sue. The United States Senate responded with a resolution directing the Attorney General to stay these proceedings until the Secretary of Interior could report on the feasibility of supplementing the supply of water in the Ahtanum Valley. The water rights controversy was effectively stalled another eighteen years until its resolution in 1956, almost half a century after it had begun.[134]

E. Conclusion

The Winters decision created broad water rights for Native Americans, and the Powers and McIntire holdings further expanded them. However, these rights have often been dissipated by political pressure and intra-government conflict.

VII. Native American Hunting and Fishing Rights

A. On-reservation Fishing Rights

Analysis of this area of law must consider on-reservation and off-reservation fishing and hunting rights. The first category has produced far more unanimity concerning the scope of the rights. In contrast, the second represents one of the most controversial and unsettled contemporary Native American legal problems.

1. Opinion of the Attorney General of Wisconsin.[132]

The Attorney General of Wisconsin was requested to determine whether state conservation laws could be applied to Native Americans residing on lands within the boundaries of any reservation in the state and also Menominee county, formerly Menominee Indian Reservation. The first issue with which the Attorney General had to deal arose because Wisconsin was a Public Law 280 state. Did this mean that when the state extended its jurisdiction, fishing and hunting rights were abrogated? The opinion stated that while Public Law 280 subjected the Indians to Wisconsin's criminal laws, it left the hunting, fishing, and trapping rights as they were prior to the enactment of the law.[133] The Attorney General concluded this point with the following statement:

> When lands are set aside for reservation purposes, whether by treaty or otherwise, specific mention of the right to hunt and fish is not necessary to preserve such right in the Indians. The right to hunt and fish was part and parcel of the larger rights possessed by the Indians in the lands used and occupied by them before the territory was settled.[134]

From this conclusion it followed that "When the United States established Indian reservations, whether by treaty or otherwise, the rights of occupancy conveyed to the Indians included the right to hunt, fish, and trap free from the state conservation laws."[135] Thus, the "state of Wisconsin [was] not free to apply its hunting, fishing and trapping laws to Native Americans residing on non-patented reservation lands when hunting, fishing, or trapping on non-patented lands within the confines of the reservation."[136]

2. Elser v. Gill Net Number One.[137]

A section of the California Fish and Game Code[138] has

specifically excepted California Native Americans from the provisions of that Code. The question in Elser was whether the intervenors, Grover Reed and Dewey George, fit within that exception. The problem arose because the intervenors were not residents of the Hoopa Valley Reservation, but had gone there to fish.

The court held that Section 12300 of the Fish and Game Code was not limited to Indians living in a tribal relation. It felt that the "statute simply required that the Indians benefited be members of a recognized tribe."[139] Since the intervenors were enrolled on several official records of the Bureau of Indian Affairs as members of a recognized tribe with recognized tribal rights, they were entitled to the exception under Section 12300.[140]

B. Off-reservation Fishing Rights

1. United States v. Winans.[141]

In Winans, the Supreme Court addressed itself to the threshhold question of whether Native American tribes had any off-reservation fishing rights. The United States brought the suit to enjoin the defendants-respondents from interferring with the Yakimas' exercise of certain fishing and hunting privileges on the Columbia River. The Yakimas based their claim on a treaty signed with the United States government in 1859. The key provision granted on-reservation hunting and fishing privileges and also gave the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory. . ."[142] The respondents-defendants interpreted this treaty clause to confer only the rights a white man would have under the conditions of ownership on the lands bordering on the river. This being true, the respondents maintained they had the power to exclude Indians from the river because the land belonged to the respondents. The Court rejected this analysis with the following holding: "The contingency of the future ownership of the lands . . . was foreseen and provided for -- in other words, the Indians were given a right in the land -- the rights of crossing it to the river -- the right to occupy it to the extent and for the purpose mentioned."[143] The court pointed out that the Land Department could grant no exemption from the treaty's provision, nothwithstanding the fact that the patents issued to the respondents were absolute in form. The patents were subject to the treaty just as they were to the other laws of the lands.

The decision in Winans established that Native Americans did possess off-reservation fishing and hunting rights under certain circumstances. In retrospect this appears to have

been the easier question. The more difficult issue was the effect of state fishing and hunting regulations on the Native American's right to hunt and fish outside the reservation.

2. Tulee v. State of Washington.[144]

In Tulee the Supreme Court had to decide precisely this question. The defendant, a Yakima, was convicted in a state court of catching salmon with a net without first having obtained a licence required by state law. The defendant contended he could never be subject to state laws because of a treaty between his tribe and the United States government. The state contended that its broad powers to conserve the fish and game within its borders gave it a virtually unrestricted right to regulate.

The Court steered a middle course between these two positions. It held that the state did have the right to impose on Indians, to the extent necessary for the conservation of fish, regulations concerning the time and manner of fishing outside the reservation.[145] But, the Court felt the license fee in question did not fit into the category of permissible regulations. The tax operated as a charge for exercising the right to fish. ". . .It is clear," the Court stated, "that the state's regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program."[146] Thus, this state law should apply to Native Americans.

3. Maison v. Confederated Tribes of the Umatilla Indian Reservation.[147]

Two somewhat inconsistent lines of authority have developed from the Tulee decision, the first of which is represented by Maison. The case involved a declaratory judgment action in which Indians were charged with violating regulations of the Oregon State Game Commission that prohibited fishing on tributaries of the Columbia and Snake Rivers during part of the year.

The Court began by acknowledging that the state has the power to regulate the Indian's right to fish when such regulation is "necessary for conservation," but may do so only after the following two facts have been established: 1) that there is a need to limit the taking of fish; and 2) that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.[148]

The court's analysis focused on the adjective "indispensable." ". . .While a restriction of the fishing activities

of the plaintiff's is indispensable, as require by . . . treaty . . . a restriction of the fishing activities of other citizens of a state is valid of merely reasonable, as required by the Fourteenth Amendment to the United States Constitution.[149]" Thus, the state could, as an alternative means of regulation, exclude sports fishermen from spawning grounds, because the "state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians."[150] The emphasis of the word "indispensable" imposes a high burden of proof on the state. It also means that the Indians' treaty rights are clearly superior to the states' police powers.

4. Puyallup Tribe, Inc. v. Department of Game.[151]

In Puyallup the Washington Department of Game and Fisheries brought an action to determine whether certain named individuals, as members of the Puyallup tribe, had any privileges or immunities from the application of state conservation measures. The specific regulation at issue prohibited the use of drift nets and set nets on anadromous fish runs in the Puyallup River.

The Court held that the state could, through its police power regulate "the manner of fishing, the size of the take, the restriction of commercial fishing . . . in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[152] Justice Douglas' rationale appeared to be that Native Americans held rights in common with other citizens, and since the state could regulate the latter, the state should also be able to regulate Native Americans. It was only the right to fish that state regulations could not impose upon, and the Court felt that none of the regulations in question affected the Native American's right to fish.

In a footnote, Justice Douglas attempted to reconcile the Court's decision with the Maison court's "indispensible" text.[153] He traced the test to its source in Tulee and pointed out that there the state of Washington had "taxed" the right to fish, which was constitutionally impermissible. Justice Douglas explained that the law involved in Puyallup was clearly a "regulation" and not a "tax," but he failed to discuss the impact of his statements on Maison. That case also involved a "regulation" and not a "tax;" nevertheless, the Ninth Circuit used the "indispensable" text. If the Tulee test is appropriate only in cases that involve a state "tax" on Native American fishing rights, then Justice Douglas appears to have overruled Maison without really saying so. Furthermore, the categories of "regulation" and "tax" cease to be meaningful when a

regulation governing the time and place of fishing becomes so prohibitive that it destroys the Native American's right to fish. But, since the state might prove that the statute was "necessary for conservation," the regulation could be upheld under the Puyallup decision.

C. Conclusion

The extent of Indian hunting and fishing rights depends on whether the site is on- or off-reservation. If it is the former, then state hunting and fishing regulations have no application. If an off-reservation site is involved, the result is much less clear. The Supreme Court has held that the state can impose regulations on Indians if they are "necessary for conservation;" but it has yet to satisfactorily distinguish a case that held the regulation must be "indispensable."

VIII. Native Americans and the States' Power to Tax

A. States Sales Taxes

1. Department of Interior Solicitor's opinion.[154]

In 1940 the Solicitor's Office of the Department of Interior considered the impact of an Arizona state sales tax on Native Americans and those trading with Native Americans. First, the opinion considered the implications of the law for traders. The Solicitor reached several conclusions on this issue. White traders would be subject to state taxation on those transactions carried on with non-Native Americans. Traders who were Native American would not be subject to state taxation whether they were dealing with Native Americans or non-Native Americans. If a trader's place of business was outside the reservation, he would be subject to a sales tax whether he was Native American or non-Native American and whether the transaction was with a Native American or non-Native American.[155]

The second issue considered by the Solicitor focused on the application of state taxes to purchases made by Native Americans. The opinion first pointed out that "sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax."[156] However, Native American purchases outside the reservation are generally subject to sales taxes. The rationale is that such taxation does not interfere with federal regulation of Native American trade. However, when a Native American purchases an item outside the reservation specifically pursuant to a government plan, such a purchase order issued by an agency superintendent, the state may not be able to tax the purchase. The rationale is that this tax causes a burden on a Federal instrumentality. The Solicitor did not know whether this was an unconstitutional burden and concluded only that courts were divided on the issue.[157]

In 1943, the Solicitor issued a second opinion on state sales taxes.[158] It covered the specific point on which the 1940 opinion had been the least clear: whether purchases made by individual Native Americans pursuant to purchase orders issued by agency superintendents and paid for out of the individual Native American's restricted accounts at the agency were subject to state sales taxes. The 1940 opinion had not taken a convincing stand on this issue. The 1943 opinion stated that unless the particular restricted funds used to make the individual purchases had been declared by Congress to be non-taxable, such funds would have no immunity from state taxation

when used outside a reservation. Thus, on this specific point the 1940 opinion was modified.[159]

3. Warren Trading Post Co. v. Arizona Tax Commission[160]

Courts have affirmed the opinions of the Solicitor's office. In Warren Trading Post the Supreme Court applied the Department of Interior's analysis to an Arizona gross sales tax. The state had attempted to impose a two percent tax on the sales of the Warren Trading Post Company, which has a store on the Navajo Reservation under a license granted by the Commissioner of Indian Affairs. The Court pointed out that there had always been comprehensive federal regulation of Native American traders. For example, under the federal statutes of 1802 and 1834 the Commissioner of Indian Affairs had been given "the sole power and authority to appoint traders to the Indian tribes" and to specify the kind and quantity of goods and the prices at which such goods (could) be sold to the Indians."[161] These statutes had always been interpreted to prohibit the state from imposing additional tax burdens on licensed Native American traders for their sales to reservation Native Americans.[162] The court saw no reason to depart from these precedents in Warren Trading Post.

B. State Taxes on Native American Real Property and Personality

1. United States v. Rickert.

In Rickert a South Dakota county treasurer attempted to tax the improvements on Native Americans' allotted lands. The Supreme Court held that the tax could not be applied to the improvements in question. The Court reached this conclusion primarily because the title to the lands on which the improvements had been made was still held by the United States. If the county tax were permitted, the lands could be sold for taxes, and since the United States still held title to the lands, it would be obliged to clear the encumbrances. This, the Court felt, was just too great a burden on the federal government. Thus, state taxes on improvements or the land itself were prohibited. The opinion also indicated that only specific Congressional legislation could confer upon the state the power to exact taxes on Indian lands and improvements.[164]

2. Your Food Stores, Inc. v. Village of Espanola.[165]

In Your Food Stores the same general question arose in a different fact pattern. The municipality of Espanola

had extended its borders to include lands belonging to Santa Clara Pueblo tribe. It subsequently attempted to enforce a municipal tax against a business that had located upon some of the incorporated land. The business had leased the land from the tribe.

The New Mexico supreme court held that the incorporation and the enforcement of the tax were impermissible. The court, replying on a Worcester-type analysis, stated that the Pueblo tribes possessed an inherent sovereignty except where it had been specifically limited by Congressional action.[166] At the time of Your Food Stores New Mexico was a non-Public Law 280 state, a fact which strengthened the court's feeling that Congress had done nothing to limit the Pueblo tribe's sovereignty. Furthermore, the state was not entitled to draw any inferences from Congress' lack of action on the jurisdiction question.[167]

3. Pourier v. Board of County Commissioners of Shannon County.[168]

Courts have generally used a similar analysis to prevent the imposition of state personal property taxes on reservation Native Americans. In Pourier Shannon County attempted to levy a personal property tax on Native American-owned cattle on the Pine Ridge Indian Reservation. The Supreme court of South Dakota concluded the tax could not be permitted. It stated that "Indian property has always been held immune from state taxation as an instrumentality of the Federal Government."[169] "This concept," the court stated, "is 'founded upon the premise that the power. . .of governing. . .tribal Indians is primarily a Federal function, and. . .a State cannot impose a tax which will substantially. . .burden the functioning of the Federal Government.' "[170]

Shannon County argued that reservation Native Americans should not be exempt from state taxes, just as they were not exempt from federal income taxes. The court considered the analogy a poor one. "Taxation or exemption of Indian by either the Federal Government or. . .the State is a matter for Congressional resolution."[171] The state must await a specific federal mandate before imposing personal property taxes on reservation Native Americans.

4. Makah Indian Tribe v. Clallum County.[172]

The Makah decision not only affirmed, but also extended the principles promulgated in Rickert and Pourier. In Makah Clallum County attempted to impose an ad valoreum tax on personal property owned, kept, and used by a tribal Makah on

the Makah Indian Reservation in a commercial enterprise, which did business with non-Native Americans. Congress had not expressly authorized the tax. On its facts the case was distinguishable from Rickert. In Makah the property sought to be taxed was not a gift or grant from the United States government, but instead had been acquired through the party's own work, savings and borrowing.

However, the court did not see this as an important distinguishing factor. It was satisfied by the fact that the personalty was "continually held, kept and used exclusively on the reservation."[173] Such personalty was not taxable by the state unless Congress specifically decided otherwise.

5. Ghahate v. Bureau of Revenue.[174]

Ghahate represents an important development in the area of state taxation of Native American real property and personalty. It appears to depart from the case law that preceded it, but the decision is a recent one and it may be too soon to tell whether the case is merely aberrational or constitutes a genuine new development.

In Ghahate the court had to decide whether Native Americans living on a reservation were obligated to pay a state income tax on income earned on the reservation. Relying on Kake and Williams, it held that New Mexico's income tax law could be applied to reservation Native Americans because "such application would (not) interfere with reservation self-government or impair a right granted or reserved by federal law."[175] Only property taxes fell into the impermissible category. Furthermore, the court was not bothered by the fact that New Mexico was a non-Public Law 280 state, because it felt that the Kake holding provided an independent basis for state jurisdiction.[176] The court's opinion provided a clear example of how Williams and Kake can be used to circumvent the proposition that a state cannot impose taxes on reservation Native Americans without an express mandate from Congress.

C. Conclusion

Most cases hold that absent a Congressional mandate a state cannot impose a tax on a reservation Native American's personalty or real property, a principle that also applies to state sales taxes. Reservation Native Americans cannot be taxed on purchases they make on the reservation; nor can traders be taxed on goods sold to Native Americans on the reservation. However, all of this may be influenced by a recent case that used the Kake test to circumvent the

proposition that Congress must make express grants of taxing power over reservation Native Americans to the state.

IX. Native Americans and the Bill of Rights

A. Talton v. Mayes[177]

The effect of the Bill of Rights,[178] the most renowned section of the Constitution, on Native American tribes has posed an especially perplexing problem. It was unclear whether the first ten amendments should apply to the tribes if, indeed, they were sovereign entities. The Supreme Court first considered this question in Talton. The appellant-defendants, both members of the Cherokee Nation, were charged with a murder that had occurred in Cherokee country. The Court had to decide whether an indictment of the defendants by a grand jury of five violated the Fifth Amendment.

The Court held that the indictment was not unconstitutional because the United States statutes that provided for indictment by a grand jury and the number of persons that constituted such a body, had no application to the Cherokees. Such statutes related only to grand juries empaneled for courts created under the laws of the United States, and since the Cherokee Nation had "local powers," its courts did not arise "under the laws of the United States."[179]

> . . .The existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the power of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution of the National Government.[180]

The Talton decision actually stands only for the proposition that, absent specific Congressional legislation, Native American tribes are not required to grant Native Americans a remedial right conferred by the United States Constitution.[181] This left for later decisions a number of important questions. The first was whether the Talton analysis should apply to those amendments to the Constitution that guaranteed fundamental rights such as the freedoms of speech and religion. The Court also failed to say explicitly what effect the Fourteenth Amendment should have on tribal actions. The Talton decision intimates that the Fourteenth Amendment has no application,[182] but

the reference is so vague that many commentators[183] consider the question to have been left open.

B. Development of the Talton Principle

1. Barta v. Oglala Sioux Tribe.[184]

Subsequent lower court decisions not only reaffirmed the Talton holding, but also answered the questions left open by the Talton Court. The Barta case involved a tax levied by the Oglala Sioux tribe on non-tribal lessees of certain tribal trust lands within the Pine Ridge Indian Reservation in the State of South Dakota. The appellants attacked the tax on Fourteenth Amendment "due process" grounds.

The circuit court upheld the taxing power of the tribe and stated that neither the Fifth nor the Fourteenth Amendment due process clauses prohibited the tax on non-tribal lessees. The court disposed of the Fifth Amendment due process argument on Talton grounds, a disposition which indicated that the Talton analysis did extend to "fundamental" rights.[185] The court stated that the Fourteenth Amendment did not apply because the tribes were not "states" within the meaning of the Amendment.[186]

2. Glover v. United States.[187]

In Glover the court reached a similar result. Glover, the appellant, had been imprisoned on the Flathead Indian Reservation. He alleged that he had been deprived of appeal to a higher tribal court and representation by legal counsel, which represented violation of his Fifth and Sixth Amendment rights respectively. The court rejected the appellant's contentions by stating that the Fifth and Sixth Amendments had no application to Indian tribes through the Fourteenth Amendment, since tribes were not "states."[188]

3. Toledo v. Pueblo De Jemez.[189]

Courts have used this analysis to handle cases involving "fundamental," as well as "remedial," Constitutional rights. In Toledo the complainants, all members of Protestant faiths, as well as the Pueblo de Jemez, charged that the Governors of their Pueblo subjected them to "indignities, threats, and reprisals" because of their Protestantism. The defendants contended that no violation of the Fourteenth Amendment had been shown since none of the actions complained of took place under color of any state statute or ordinance.

The court agreed with the defendant's contention. It held that since it was "clear . . . the Pueblos do not derive their governmental powers from the State of New Mexico," the court did not even have jurisdiction over the complaint.[190]

4. Native American Church v. Navajo Tribal Council.[191]

In Native American Church the Tenth Circuit considered a First Amendment issue. The Navajo Tribal Council had passed an ordinance outlawing the use of peyote in religious ceremonies. The Native American Church argued that the ordinance violated the First Amendment as applied to the tribes through the Fourteenth Amendment.[192]

The court rejected the second half of this proposition. It felt that for purposes of the Fourteenth Amendment the tribes were not "states." They have a status higher than that of the states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have been expressly required to surrender them by the superior sovereign the United States."[193] The court held that the Navajos were not subject to the laws of the United States, and federal courts were thus without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation.

5. Colliflower v. Garland.[194]

In Colliflower the Ninth Circuit departed rather abruptly from the pattern of precedents in the Bill of Rights area. Mrs. Colliflower, a Native American living on the Fort Belknap Indian reservation, had been imprisoned for permitting her cattle to graze on someone else's property. She appealed from a dismissal of her writ of habeas corpus in a federal district court.

The appellate court began its opinion by admitting that the Supreme Court had long treated the tribes as separate nations or entities having some degree of sovereignty. But, the court countered this concept with its belief that "there [was] ...a strong trend toward applying general congressional legislation to Indians."[195] It thus rejected the broad implication of decisions like Native American Church.

In order to avoid conflict with a number of precedents, the holding in Colliflower was extremely narrow. The court indicated that it could find no case which holds "that the courts of the United States do not have jurisdiction to issue writs of habeas corpus to inquire into the legality of the imprisonment of an Indian pursuant to an order of judgment of an Indian court."[196] On this basis the court sought to distinguish

the cases of Worcester,[197] Ex Parte Crow Dog,[198] Iron Crow,[199] Native American Church,[200] and Barta.[201]

The Court also concluded that the Fort Belknap tribal court was an arm of the federal government since it was largely created by it. This fact justified the habeas corpus proceeding:

> . . .We think that these courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of Indian pursuant to an order of the Indian court.[202]

Finally, the court attempted to point out how truly limited its decision was. The opinion did not reach the merits of the case; nor did it indicate that a tribal court must apply every constitutional restriction that is applicable to federal or state courts. It did not even say that the Fourteenth Amendment was necessarily applicable to tribal courts.

The Colliflower decision produced a number of sharply divergent reactions. One commentator believed that the Ninth Circuit correctly labeled the Fort Belknap tribal court as an "arm of the federal government." "Indian courts," it noted, "are organized by an executive branch of the government, are sustained with money appropriated for their use by Congress, and are legally approved by federal court decision . . . A federal agency, the Bureau of Indian Affairs, is the controlling force in Indian courts, rather than the sovereign Indian nation itself."[203] The commentator also pointed to the fact that most of the constitutions and by-laws of the tribes were prepared by the Bureau and are the same as the Bureau's own regulations.

The Ninth Circuit had attempted to limit its holding by pointing out that the Fort Belknap tribal court was a "court of Indian offenses," which distinguished it from other tribal courts. This distinction may work in some instances, but generally it will prove to be superficial. With the exception of traditional tribal courts, most tribal courts have approximately the same amount of involvement with the federal government. Thus, the implementation of Colliflower would probably subject many tribal court proceedings to habeas corpus review by federal district courts.[204]

The Colliflower decision can be limited in a number of ways. First, the court does not intimate which Constitutional protections must apply to the Fort Belknap courts. More

important. The opinion appears to distinguish between tribal courts as federal instruments for purposes of jurisdiction and for purposes of Constitutional protections. Second, the remedy of habeas corpus is normally available only to persons in custody or on parole. This will not help anyone wishing to challenge arbitrary action by tribal officials which does not involve criminal activity.

In Summary, a close reading of Colliflower leaves the distinct impression that the court felt Mrs. Colliflower had been unjustly detained and wanted desperately to remedy her plight without overturning a century's worth of precedents. Despite its care, the court used language which could be much more broadly interpreted in the hands of a less discriminating court.

C. Conclusion

The Talton decision provided an approach to the question of whether the Bill of Rights should be applied to Native American tribes. Although Talton itself dealt only with remedial rights, its analysis was subsequently expanded to encompass fundamental rights. In addition, a number of cases have also refused to apply the Bill of Rights to tribes through the Fourteenth Amendment. These courts base their decision on the belief that tribes are not "states." The Colliflower decision represented a new development in this area of law. However, Colliflower's impact was largely mooted by the passage of Title II of the Civil Rights Act of 1968.

X. Title II--The Indian Bill of Rights

A. The Provisions of Title II

The passage of Title II of the 1968 Civil Rights Act[205] made any discussions of Colliflower's impact on Talton largely academic. Title II represented the specific Congressional legislation that prevented the Talton issue from ever arising. With several important exceptions, Title II incorporated the First and Fourth through Eight Amendments of the Constitution. Congress did not include the "establishment" clause of the First Amendment,[206] and guaranteed the Sixth Amendment right to counsel only at the defendant's own expense.[207] The Act also provided no right to indictment by a grand jury, but the petit jury provision assures a jury of six members in all cases involving the possibility of imprisonment.[208] In addition to the provisions drawn from the Bill of Rights, Title II also prohibited tribes from denying "any person within its jurisdiction the equal protection of its laws,"[209] or passing any bill of attainder or ex post facto law.[210]

B. Legislative Background of Title II

Title II was Congress' response to problems it felt had developed in the tribal judicial system. At the time Congressional hearings for the Bill of Rights began, eighty-five tribes had developed their own courts, largely with the guidance of the Bureau of Indian Affairs. In these courts the tribes usually allowed only non-attorney counsel, a privilege that was not frequently exercised.[211] There were few written records due to lack of finances and education.[212] Among some of the Pueblo tribes this situation was further complicated by the fact that Pueblo law was sometimes entirely customary with no written code of ordinances. While some tribes provided for a right to jury trial, the right was rarely exercised. Finally, there was usually no appeal outside the tribe. In theory many tribes provided for appeals to the council or an enlarged panel of judges, but this right, too, was seldom invoked.[213]

The legislative record demonstrates that it was this picture of tribal judicial practices that concerned members of Congress. Their questions and discussion focused almost entirely on criminal tribal procedures in the tribal courts.[214] The remedy provided by the Act, a habeas corpus proceedings,[215] shows the care taken to assure that lack of an extensive tribal court record would not prevent federal court review of criminal procedures in the tribal courts.

The legislative record does not reflect a desire on

Congress' part to use Title II as an instrument for reshaping tribal cultural values. The Congressmen continually asked witnesses about the effects the imposition of stricter criminal procedural standards would have on the tribal courts.[216] The Act in final form contained several changes based on this concern. The Committee omitted the establishment clause of the First Amendment which had been included in an earlier draft. The Act also included no reference to the Fifteenth Amendment's prohibition on racial classification. These provisions were excluded because the Committee felt the first might threaten the Pueblos' theocratic form of government and the second might prove an obstacle to the cultural autonomy of all tribes.[217] On the strength of this legislative history one commentator has concluded that "the historical and legislative background of Title II. . .manifest Congressional intent to preserve, if not enhance, tribal sovereignty. . ."[218]

C. Problems with the Implementation of Title II

The problem then becomes how to shape the provisions of the Indian Bill of Rights to conform with Congressional intent. To demand that tribal courts comply with the same constitutional standards imposed on state and federal courts conflicts with the concept of Native American tribes as culturally and ethnically autonomous. For example, if tribal courts were required to apply the same equal protection standard that is applied in state and federal courts, a significant burden could be imposed on tribal cultures. Any tribe that did not elect councils from equal-population districts would be in violation of the Indian Bill of Rights equal protection clause.[219] Application of a rigorous equal protection standard might also prohibit some classifications based on blood quantum.

The First Amendment provision in the Indian Bill of Rights represents another potentially troublesome constitutional right. If strict standards of free speech[220] are imposed on tribal courts, Indian culture might be subverted. Most tribes oppose the open airing ofcontroversy. It may be that a flexible standard could be devised for the speech provision: stricter requirements would be used to protect a tribal member's speech than a non-member's. In addition, the "free exercise" clause of Title II would prohibit any flagrant cases of oppression like Toledo or Native American Church. A broader application might, for example, threaten the Pueblos' theocratic structure, which is at the very heart of Pueblo culture.

There are a number of techniques that could be employed to avoid or at least mitigate most of the problems mentioned above. First, in view of the fundamental differences in culture

a federal court could "re-interpret" due process for purposes of applying it to tribal courts. One commentator has suggested the possibility of placing Native American tribes in the category of "unincorporated territories."[221] This category, which was created by Congress to take into consideration the cultural uniqueness of the territories acquired by the United States, would mean only a limited application of the Bill of Rights.

D. The Remedy in Title II

The remedy provided in Title II is a writ of habeas corpus.[222] The chief advantage of habeas corpus, and one that appears to have been uppermost in the minds of those who drafted the act, is that it does not allow the lack of an extensive tribal court record to preclude effective federal court review. While an appellate court must have a trial court record before it can hear an ordinary appeal, the court in a habeas corpus proceeding hears the case de novo. However, in other respects habeas corpus provides a rather limited remedy. It usually applies only in cases where a person has actually been detained. Thus, a Native American who had not been imprisoned by a tribal court would be without a remedy.[223] Habeas corpus also would have no application to a tribal court decision in a civil case.

E. Dodge v. Nakai[224]

To date only Dodge has considered the implications of Title II. In that case Theodore Mitchell, the white director of the Navajo Legal Services office, sued in a federal district court to prevent the Navajo Tribal Council from excluding him from the reservation. The exclusion stemmed from an incident in which Mitchell had allegedly insulted a tribal council member by laughing.

The federal court granted Mitchell's request to enjoin the Council from excluding him from the reservation. It indicated that Title II of the Civil Rights Act of 1968 imposed new responsibilities on the tribal governments regardless of what had been their autonomy prior to the Act. The court held that excluding Mitchell on the basis of his laugh was a violation of due process and an infringement of Mitchell's freedom of speech. Since the Council was acting in its legislative capacity in excluding Mitchell, and did so without a "judicial trial," its action also violated the "bill of attainder" provision of the Indian Bill of Rights.[225]

F. Conclusion

The enactment of Title II of the 1968 Civil Rights Act

overruled the Talton decision. Certain parts of the Bill of Rights and the Fourteenth Amendment will now be applied to Native American tribal courts and governments. Those who drafted the Indian Bill of Rights evidenced considerable concern for the preservation of tribal culture. Although the provisions of Title II were taken directly from the United States Constitution, they should nevertheless not be applied to tribal courts in the same way that the Bill of Rights provisions are applied to state and federal courts. A failure to make this distinction might very well mean the demise of traditional Native American cultural values.

FOOTNOTES

1. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 3 (1831).
2. Worcester v. Georgia, 31 U.S. (6 Peters) 521 (1832).
3. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 3, 17 (1831).
4. Id.
5. U. S. Const. Art. I, § 8.
6. Cherokee Nation v. Georgia, 30 U.S. at 18.
7. Id. at 17.
8. Id. at 48.
9. Treaty of Hopewell, 7 Stat. 18 (1785).
10. Cherokee Nation v. Georgia, 30 U.S. at 23.
11. Id. at 25.
12. Id. at 53.
13. Id.
14. Id.
15. Worcester v. Georgia, 31 U.S. (6 Peters) 521 (1832).
16. See Id. at 521-34.
17. Id. at 549.
18. Id. at 555.
19. Id. at 557.
20. Id. at 561.
21. Id. at 593.
22. Id. at 594.
23. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566; 25 U.S.C. § 71 (1964).
24. Act of August 15, 1953, ch. 505, 67 Stat. 588; 18 U.S.C. § 1162 (1964); 28 U.S.C. § 1360 (1965).
25. Act of August 15, 1953, ch. 505, §2, 67 Stat. 588, extended state criminal jurisdiction over reservations in California (all Indian country), Minnesota (all except Red Lake Reservation), Nebraska (all Indian country), Oregon (all except Warm Springs Reservation, and Wisconsin (all except Menominee Reservation).
26. Id. at 589. This provision covered the same areas as § 2.
27. Id. at 590. Only recently was this Act amended to provide that criminal and civil jurisdiction can be assumed by a state only if the tribe involved consents. See 25 U.S.C.A. 1321 (a)-1322 (a) (Supp. 1971).
28. 358 U.S. 217 (1959).
29. Id. at 218.
30. Id. at 219.
31. Id. at 223.
32. See text accompanying Note 20 infra.
33. 369 U.S. 60 (1962).
34. Id. at 75.
35. Id. at 71-72.
36. Id. at 69.
37. See United States v. Clapox, 35 F. 575 (D. Ore. 1888).
38. Id.

39. "The Judicial Power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1.
40. United States v. Clapox, 35 F. at 577.
41. See Fretz, "The Bill of Rights and American Indian Tribal Governments," 6 Natural Resources J. 581, 583 (1966).
42. Id.
43. See Davis, "Court Reform in the Navajo Nation," 43 AM. Judicature Society Journal 52, 53 (1959).
44. Id. at 54.
45. See, e.g., Buckman v. State, 139 Mont. 630, 366 P. 2d 346 (1961).
46. 109 U.S. 556 (1883).
47. Id. at 557.
48. 231 F. 2d 89 (8th Cir. 1956).
49. Id. at 96.
50. Id. at 98.

51. See, e.g., 18 U.S.C. §1162 (1964); 28 U.S.C. §1360 (1965).
52. See, e.g., U. S. Revised Statutes, Title XXVIII, ch. 4, §§2142-45 (1878).
53. See, e.g., Act of March 3, 1885, ch. 341, §9, 23 Stat. 362, as amended, 18 U.S.C. §1153 (1964).
54. 5 Dillon 394 (1879).
55. Id. at 404.
56. 5 Dillon 385 (1878).
57. Act of March 3, 1885, ch. 341, §9, 23 Stat. 362.
58. Id. at 385.
59. Act of March 4, 1909, ch. 321, § 328, 35 Stat. 1151.
60. Act of June 28, 1932, ch. 284, 47 Stat. 337.
61. Id.
62. Act of November 2, 1966, Pub. L. No. 89-707, § 1, 80 Stat. 1100.
63. Id.
64. Act of April 11, 1968, Pub. L. No. 90-284, Tit. V, §501, 82, Stat. 80.
65. See comment, "Indictment Under the 'Major Crimes Act'--An Exercise in Unfairness and Unconstitutionality," 10 Ariz. L. Rev. 691, 695 (1968).
66. Id.
67. 118 U.S. 375 (1886).
68. Id. at 383-84.
69. 85 N.W. 2d 432 (N.D. 1957).
70. Id. at 433.
71. Id. at 437.
72. 82 S.D. 650, 152 N.W. 2d 547 (1967).
73. 82 S.D. at 655.
74. 76 N.M. 562, 417 P. 2d 51 (1966).
75. 76 N.M. at 564.

76. Id.
77. 140 Colo. 334, 346 P. 2d 1012 (1959).

78. 140 Colo. at 339.
79. 10 F. 2d 804 (N.D. Okla. 1926).
80. Id. at 806.
81. 53 I.D. 78 (1930).
82. Id. at 93.
83. 74 I.D. 397 (1967).
84. Id. at 399-400.
85. Id.
86. Id. at 399.
87. 57 Wash. 2d 181, 356 P. 2d 985 (1960).
88. Id.
89. 57 Wash. 2d at 188.
90. See Act of June 2, 1924, ch. 233, 43 Stat. 253.
91. See 8 U.S.C.A. § 1401 (a) (2).
92. 112 U.S. 94 (1884).
93. Id. at 100.
94. Id. at 104.
95. Id. at 118.
96. 178 N.W. 437 (N.D. 1920).
97. Id. at 438.
98. Id. at 441.
99. Id.
100. Id.
101. 305 P. 2d 490 (Utah 1957).
102. 34 Ariz. 308, 271 P. 411 (1928).
103. 305 P. 2d 490 (Utah 1957).
104. Id. at 495.
105. 34 Ariz. 308, 418-19, 271 P. 411 (1928).
106. 67 Ariz. 337, 196 P. 2d 456 (1948).
107. 67 Ariz. at 463.
108. "That any person who shall sell, give away, dispose of, exchange or barter any malt, spiritous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever . . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship . . . shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter . . ." Act of January 30, 1897, ch. 109, 29 Stat. 506.

109. 197 U.S. 488 (1905).
110. Id.
111. Id. at 509.
112. 241 U.S. 591 (1916).
113. Act of January 30, 1897, ch. 109, 29 Stat. 506.
113A. See generally California Indian Legal Services, Protection of Indian Water Rights: A Demonstration Project (1969).

114. 207 U.S. 564 (1908).
115. Id. at 577.
116. 305 U.S. 527 (1939).
117. Id. at 532.
118. 101 F. 2d 650 (9th Cir. 1939).
119. Id. at 651-53.
120. 236 F. 2d 321 (9th Cir. 1956).
121. Id. at 327.
122. 373 U.S. 546, 600 (1963).
123. 104 F. 2d 334 (9th Cir. 1939).
124. Id. at 335.
125. Id. at 340.
126. See, e.g., Sondheim and Alexander, "Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?" 34 So. Calif. L. Rev. 1 (1960).
127. See California Indian Legal Services, supra note 113A.
128. United States v. Ahtanum Irrigation Dist., 236 F. 2d 321, 330 n. 12 (9th Cir. 1956).
129. Id.
130. Id.
131. Id.
132. 56 Opinions of the Atty. Gen. Wisc. 11 (1967).
133. Id. at 16.
134. Id. at 18.
135. Id. at 19.
136. Id.
137. 246 Cal. App. 2d 30, 54 Cal Rptr. 568 (1966).
138. "Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, under those places and circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280 . . ." Cal. Fish and Game Code §12300 (1955).
139. Elser v. Gill Net Number One, 246 Cal. App. 2d at 238.
140. Id.
141. 198 U.S. 371 (1905).
142. Quoted in Id. at 378.
143. Id. at 381.
144. 315 U.S. 681 (1942).
145. Id. at 684.
146. Id. at 685.
147. 314 F. 2d 169 (9th Cir. 1963).
148. Id. at 172.
149. Id. at 174.
150. Id.
151. 391 U.S. 392 (1968).
152. Id. at 398.
153. See Id. at 402 n. 14.
154. 57 I.D. 124 (1940).
155. Id. at 126.
156. Id.

157. Id. at 128.
158. 58 I.D. 562 (1943).
159. Id. at 567.
160. 380 U.S. 685 (1965).
161. Id. at 689.
162. Id. at 690.
163. 188 U.S. 432 (1903).
164. Id. at 445.
165. 68 N.M. 327, 361 P. 2d 950 (1961).
166. 68 N.M. at 331.
167. Id. at 332.
168. 157 N.W. 2d 532 (S.D. 1968).
169. Id. at 534.
170. Id.
171. Id.
172. 440 P. 2d 442 (Wash. 1968).
173. Id. at 446.
174. 451 P. 2d 1002 (N.M. 1969).
175. Id. at 1004.
176. Id.
177. 163 U.S. 376 (1896).
178. U.S. Const. Amends. I-X.
179. Talton v. Mayes, 163 U.S. 376, 382 (1896).
180. Id. at 384.
181. See Lazarus, "Title II of the 1968 Civil Rights Act: An Indian Bill of Rights," 45 N.D. L. Rev. 337 (1969).
182. Talton v. Mayes, 163 U.S. at 384.
183. See e.g., Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," 82 Harv. L. Rev. 1343 (1969).
184. 259 F. 2d 553 (8th Cir. 1958).
185. Id. at 557.
186. Id.
187. 219 F. Supp. 19 (D. Mont. 1963).
188. Id. at 21.
189. 119 F. Supp. 429 (D. N.M. 1954).
190. Id. at 432.
191. 272 F. 2d 131 (10th Cir. 1959).
192. Id. at 134.
193. Id.
194. 342 F. 2d 369 (1965).
195. Id. at 376.
196. Id. at 377.
197. See text accompanying notes 15 through 20 supra.
198. See text accompanying notes 46 through 47 supra.
199. See text accompanying notes 48 through 50 supra.
200. See text accompanying notes 191 through 193 supra.
201. See text accompanying notes 184 through 186 supra.
202. Colliflower v. Garland, 342 F. 2d at 379.
203. Note, 26 Mont. L. Rev. 235, 236 (1965).
204. See 79 Harv. L. Rev. 436, 438 (1965).

205. "No Indian tribe in exercising powers of self-government shall--
(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
(8) deny any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons. 25 U.S.C.A. § 1302 (Suppl. 1971).

206. "Congress shall make no law respecting an establishment of religion . . ." U.S. Const. Amend. I.
207. See 25 U.S.C.A. §1302 (6) (Supp. 1971).
208. See 25 U.S.C.A. §1302 (10) (Supp. 1971).
209. See 25 U.S.C.A. §1302 (8) (Suppl. 1971).
210. See 25 U.S.C.A. §1302 (9) (Supp. 1971).
211. See Hearings on Const. Rts. of the Am. Ind. Before the Subcomm. on Const. Rts. of The Senate Comm. on the Judiciary, 87th Cong. 1st Sess., pt. 2, at 247-50 (1963). Most of the Hearings on the Indian Bill of Rights are contained in the following volumes: Hearings on Const. Rts. of the Am. Ind. Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess., pt. 1 (1962); Hearings on Const. Rts. of the Am. Ind. Before the Subcomm. on Const.

Rts. of the Senate Comm. on the Judiciary, 87th Cong. 1st Sess., pt. 2 (1963); Hearings on Const. Rts. of the Am. Ind. Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary, 87th Cong. 2d pt. 3 (1963); Hearings on Const. Rts. of the Am. Ind. Before the Subcomm. on Const. Rts. of the Senate Comm. on the Judiciary, 88th Cong. 1st Sess., pt. 4 (1964). [hereinafter referred to as the 1961-63 Hearings].

212. 1961-63 Hearings, supra note 211, at 103, 135, 151.
213. 1961-63 Hearings, supra note 211, at 390, 436, 446.
214. See generally 1961-63 Hearings, supra note 211.
215. "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C.A. §1303 (Supp. 1971). In an ordinary appeal the appellate court must have a record of the proceeding below before it can hear the case. But, in a habeas corpus proceeding, the appellate court holds a hearing de novo.
216. 1961-63 Hearings, supra note 211, at 99, 147, 873,75.
217. Hearing on Const. Rts. of the Am. Ind., S. 1961-68 and S.J. Res. 40, Before the Subcommittee on Const. Rts. of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., at 18, 21, 221 (1965) [hereinafter referred to as the 1965 Hearings].
218. Lazarus, supra note 181 at 351.
219. See Note, supra note 183, at 1361-62.
220. See e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
221. See Note, supra note 183 at 1352.
222. 25 U.S.C.A. §1303 (Supp. 1971).
223. See Reiblich, "Indian Rights Under the Civil Rights Act of 1968," 10 Ariz. L. Rev. 617 (1968); but see Lazarus, supra note 181 at 349.
224. 298 F. Supp. 26 (D. Ariz. 1969).
225. Id. at 32.

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